IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 20

JOYCE C. THORPE, *Petitioner*,

v.

HOUSING AUTHORITY OF THE CITY OF DURHAM.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF FOR RESPONDENT

DANIEL K. EDWARDS
WILLIAM Y. MANSON
111 Corcoran Street
Durham, North Carolina
Attorneys for Housing Authority of the City of Durham.

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

The Petitioner was a tenant under a written lease in a housing project owned by the Respondent which was constructed with funds borrowed from private sources and which is supported, in part, by annual contribu-

tions from the Federal Government pursuant to a Contract with the Respondent, Housing Authority of the City of Durham. The Housing Authority is a corporation, organized under the Housing Authority Law of the State of North Carolina, which empowered it to enter into an Annual Contributions Contract with agencies of the Federal Government. Pursuant to the terms of the lease, the Housing Authority gave the Petitioner notice it was not renewing the term of her lease and instituted an eviction proceeding in the Courts of the State after the tenant failed to vacate at the end of the term. The Petitioner defended, contending that she was being evicted because she had participated in a tenants' organization and that she was entitled, as a matter of law, to an administrative hearing before the institution of the eviction proceedings in the State Courts. It was determined, as a matter of fact, that the reason for her eviction was not her participation in the organization of a tenants' group.

1. Under these circumstances, does the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States require that the Petitioner be given an administrative hearing prior to the institution of an eviction proceeding against her in the State Courts?

2. Was the eviction proceeding in the Courts of the State of North Carolina violative of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Was a HUD Circular, promulgated on February 7, 1967, effective to invalidate the eviction action in the Courts of the State of North Carolina, instituted in the State Courts on September 17, 1965?

STATEMENT OF FACTS

It was stipulated by the parties to this action that the Petitioner occupied a dwelling apartment owned by the Housing Authority of the City of Durham pursuant to and under and by virtue of a lease which she entered into with the Housing Authority. (A. 5). It was also established for the purposes of this case by stipulation that the Petitioner received the notice of termination; that she alleged that the reason she was being evicted was her participation in the organization of the Parents' Club; that the trial Judge could hear and determine the cause by finding facts based on the stipulations and any Affidavits entered into the record; that the Executive Director of the Housing Authority, if present and duly sworn, would testify that whatever reason there may have been, if any, for giving notice to Petitioner of the termination of her lease it was not for the reason that she was elected President of any group organized in McDougald Terrace, and not for any other reason set forth in her Affidavit, and was not because of her efforts to organize the tenants; and, further, that the Executive Director did so testify in the hearing before the Justice of the Peace when the case was initially heard. (A. 6 & 7). Petitioner alleged in her Affidavit that "On the 1st day of September, 1965, the Housing Authority of the City of Durham and C. S. Oldham met with Detective Frank McRae, of the Police Department of the City of Durham, who supplied them with certain information allegedly uncovered during the investigation of her conduct." (A. 9).

The trial in the Superior Court of North Carolina, though on appeal from the Judgment of the Justice of the Peace, was *de novo,* and in the absence of

stipulation would require the introduction of evidence by the Housing Authority to make out its case. Proceeding according to the stipulation, the Court found for the Housing Authority, making specific findings of fact with respect to the Petitioner's allegation as to the reason for the termination of her lease. (A. 21).

During the trial, the Petitioner offered no evidence that was excluded by the Court and made no effort to cross-examine any witness of the Housing Authority or any official of the Housing Authority. In the Petitioner's Exceptions and Assignments of Error on appeal to the Supreme Court of North Carolina, there was no mention of any refusal by the trial Court to admit any evidence offered by the Petitioner nor any complaint about any refusal of the trial Court to permit any cross-examination. (A. 25).

This Court remanded the case to the Supreme Court of North Carolina to determine what effect, if any, the HUD Circular of February 7, 1967, had upon the proceedings. The Supreme Court of North Carolina, after hearing, held that the HUD directive, whatever its prospective effect might be, did not invalidate the notice of August 11, 1965, terminating Petitioner's lease nor the eviction proceedings instituted in the State Courts on September 17, 1965.

SUMMARY OF ARGUMENT

The Petitioner, finding nothing in the relevant legislation enacted by the Congress of the United States or by the State Legislature of North Carolina that bestows upon her a right to occupy a dwelling unit in the housing project owned by the Respondent, other than the right acquired by virtue of executing the lease, has resorted to this Court, contending that it

should supply such legislative omission by interpretation of the provisions of the Constitution of the United States. We respectfully submit that it is the wisest course to leave the issues stirred here with the legislative branch which has the fiscal resources to implement its decisions as well as the responsibility to limit the scope of its decisions to its financial resources. The Constitution may permit the Congress to provide housing for all indigent persons, but it does not require that it be done. We submit further that the Constitution does not prohibit the Congress from providing housing for some indigents without providing it for all.

By its appropriations the Congress has, in fact, sought to provide housing for some, but not all, of the indigents in the country. It has not sought to establish which of these indigents shall receive the housing, leaving that matter to the discretion of local agencies with the exception of certain priorities that it established for certain categories of persons. These categories do not affect this Petitioner.

A decision by this Court that all equally eligible indigents have a Constitutional right of occupancy of dwelling units in low-rent housing projects would nullify the purpose and effect of the United States Housing Act of 1937, as amended, since that Act and the appropriations supporting it cannot implement that result.

The program of the Congress to inject into the housing market a substantial number of low-rent housing units should not be struck down because it is not all-inclusive nor because the technique employed is not the building and operation of housing

units by the Federal Government but by financial support to State and local agencies conducting local programs.

A First Amendment issue does not present itself on this record. The record in this case does not show that Petitioner was evicted because of the exercise of any such Constitutional right. The opinion of the North Carolina Supreme Court on rehearing makes clear that it does not support the theory that a tenant may be evicted for the exercise of such a right.

The trial Court found on competent evidence that the Housing Authority did not notify the tenant that her lease would not be automatically renewed for another term because she exercised a First Amendment right as she asserted. Neither the trial Court nor the State Supreme Court refused the tenant right to present evidence nor to have the Court make findings upon that issue. In a judicial eviction proceeding, the North Carolina Statute does require the landlord to affirmatively show only that the tenant is holding over after the expiration of the term of his lease or that he has violated some provision of the lease. Assuming, arguendo, that a tenant could defeat an eviction by showing the Housing Authority was motivated by a design to prevent the exercise of a Constitutional right, this Statute is not unconstitutional as it applies to the Housing Authority as a landlord, since it does not prevent the tenant from asserting or showing that the notice, whereby the Housing Authority prevented the automatic renewal of the term of the tenant's lease, was invalid and ineffectual for that reason. The Constitution does not place this burden of proof upon this landlord.

This eviction, being through judicial process, afforded the tenant a full judicial hearing in the trial Court which would seem to be more impartial and constitutionally acceptable than a hearing by the Housing Authority itself. The Petitioner had, therefore, full opportunity to establish any lawful defense she wished. During the trial of this action, the tenant did not seek to inquire into any reasons the Housing Authority may have had for failing to renew her lease other than her assertion that it acted because of her organizational activities among the tenants. She did raise that issue, and the trial Court passed upon it—not by ruling it irrelevant, but by finding against her on the evidence. The procedures available to the tenant in this case adequately protected her from any reprisals for the exercise of any Constitutional rights.

The tenant has no Constitutional right to remain in occupancy without a lease or after the expiration of the term of the lease. The fact that the lease, by its terms and provisions, was for thirty days' duration (instead of being for the lifetime of the tenant) did not constitute a violation of the Constitution nor the Federal or State Statutes pertaining to the Housing Authority's operation.

The relationship between the Petitioner and the Housing Authority being contractual—that is, by virtue of a lease—and the relationship between the Housing Authority and HUD being contractual by virtue of a written Annual Contributions Contract, the Constitution does not require the State Courts to give the HUD Circular of February 7, 1967, a retroactive effect to amend these Contracts as of the date notice of termination was given.

ARGUMENT

I.

THE EVICTION PROCEEDINGS IN THE COURT BELOW DID NOT VIOLATE CONSTITUTIONAL DUE PROCESS BECAUSE AN ADEQUATE HEARING WAS PROVIDED DURING THE TRIAL BELOW AND BECAUSE THE HOUSING AUTHORITY WAS NOT REQUIRED TO HAVE A REASON OTHER THAN THE EXPIRATION OF THE TERM OF THE LEASE.

A. An Adequate Hearing Was Provided by the Trial Below

Justice White, in his dissenting opinion in *Thorpe* v. *Housing Authority,* 386 US 670 (1967), stated: "Petitioner was afforded a full due process hearing in the lower court and had the opportunity to explore fully why she was evicted." Justice Douglas, in his concurring opinion, stated: "Moreover, is there a constitutional requirement for an administrative hearing where, as here, the tenant can have a full judicial hearing when the Authority attempts to evict him through judicial process? Petitioner has had a hearing in the State Courts." In her Brief, the Petitioner states: "Certainly, proceedings in open court, held before the governmental action at issue became effective, might satisfy the requirements of due process." (Petitioner's Brief, p. 43). Justice Brandeis, delivering the opinion of the Court in *Bourjois* v. *Chapman,* 301 US 183, 189, 57 S. Ct. 691, 81 L. Ed. 1027 (1937), made the same point.[1] To like effect is *Randell* v. *Newark*

[1]He said: "And neither Constitution (Constitution of the State of Maine and the Constitution of the United States) requires that there must be a hearing of the applicant before the Board may exercise a judgment under the circumstances and of the character here involved. The requirements of due process of law amply safeguarded by Section 2 of the Statute, which provides: 'From the refusal of said department to issue a certificate of registration for any cosmetic preparation, appeal shall lie to the Superior Court in the County of Kennebec or any other County in the State from which the same was offered for registration'."

Housing Authority, 384 F. 2d 1951 (CCA 3-1967), where the Court said: "... the problem of eviction of tenants is governed by the New Jersey judicial rules relating to proceedings between landlord and tenant.... Under these statutes, in order for a housing authority to enforce an eviction, they must have recourse to the state courts. ... Viewing thus the entire statutory pattern, it does seem clear that the most probable interpretation of the statutes guarantees due process via the necessary role the state courts play in any eviction."

During the trial of this matter in the Superior Court, the defendant did not quarrel with the nature nor with the scope of the judicial inquiry, but contended only that due process required that the Housing Authority give the tenant notice of its reasons and a hearing thereon *before* it instituted eviction proceedings—in fact, before giving her notice of termination. This was the theme of Petitioner's "Motion to Quash" in the Superior Court. (A. p. 10). When the trial Court found as a fact that, prior to giving her notice of the termination of the lease, the Petitioner was not given a hearing by the Housing Authority and that the Housing Authority gave no reason to the defendant for giving her notice the lease was being terminated at the end of the term, it found further that the Petitioner "had no hearing other than that before the Justice of the Peace in this eviction action and in this Court" (A. p. 22). The Petitioner did not object or except to this, and, in her Assignments of Error on Appeal from the Superior Court to the Supreme Court of North Carolina, did not object to the scope of the judicial inquiry. There was no request that the trial Court enlarge its inquiry into matters not acted upon by the Court in its findings of fact nor any request for examination of any witnesses

that was denied. As the Court said in *Randell* v. *Newark Housing Authority, supra:* "A party cannot refuse to make any use of a system of 'administrative' and 'judicial' relief clearly open to him and thus create a record on which a Federal Court can decide that the party has been denied due process, or that due process safeguards are lacking."

The Petitioner's present position—that it would have been futile for Petitioner to have attempted to explore the pre-eviction notice situation further during the trial because under the eviction statute of North Carolina the Court could not make such an exploration possible—is not valid. In its findings the trial Court itself found that she was having a hearing on this matter in the course of the trial (A. p. 22). It is true, as Petitioner asserts (Petitioner's Brief, p. 43), that this action was brought under North Carolina General Statutes, Section 42-26(1), which is an action based on a tenant's holding over after the expiration of the term of his lease, but that would not restrict the inquiry. On that issue, the Housing Authority had to show the lease and the language thereof that provided for a term of a period of thirty days, and was automatically renewable unless a fifteen-day notice was given. It would then have to show that a lawful notice was given in order that the term of the lease not be automatically renewed. The nature of the notice, its language, its timing, and its motivation could be inquired into.

There was some language in the original opinion of the North Carolina Supreme Court in this case that could be construed as saying the motivation was not material, although we do not agree this construction

would be proper. However, on rehearing, the North Carolina Supreme Court certainly clarified that point by carefully considering the contention of the Petitioner that she had been evicted because of her organizational activities among the tenants and the finding of the trial Court that she had not been evicted for that reason—this being her sole contention about motives. The Court did not consider what other and additional inquiry or efforts at discovery the Petitioner could have made before or during the trial since on the record there was no issue of that sort before the Court (A. pp. 38, 39, 40). We do not contend that, in the case of Housing Authority leases if the purpose of the notice of termination of the lease is to proscribe the exercise of a constitutional right by the tenant the notice would be effective; the notice would be invalid, and the term of the lease and its automatic renewal would not thereby be affected.

The Petitioner now contends, however, that "Because of the Court's apparent new view that the reason for eviction had become relevant, it should have, instead of reaffirming, remanded the case to the trial court to require the Authority to come forward with a reason for its action and to give Petitioner an opportunity to present her evidence and to have the cause tried on the true issues." (Petitioner's Brief, pp. 45, 46.) This assumes that constitutional due process requires that whenever a Housing Authority presents its eviction case in Court, it must not only introduce the lease and evidence showing that the term of the lease had expired by reason of proper notice being given as provided in the lease, but, also, to show a judicially acceptable reason for its relying on the termination procedures stated in the lease.

B. The Housing Authority Was Not Required To Show a Reason Other Than the End of the Term of the Lease

When we agree that there are reasons for which the Housing Authority could not terminate the Petitioner's lease, we are talking about reasons such as those alleged by the Petitioner in the trial Court—to-wit, an infringement upon the exercise of some constitutional right. For the most part, tenants would certainly be aware of any deprivation of such constitutional rights and would be able to allege that they were being restricted in the exercise thereof. It is not reasonably necessary to require the Housing Authority to state some other reason for the sole purpose of negating a possible infringement upon the exercise of the constitutional right. Moreover, for the Authority to establish that it had no reason other than its desire to terminate the lease would be just as effective for this purpose. It is not unreasonable to require the tenant to assert what constitutional right is being violated. (*Snowden* v. *Hughes,* 321 US 1; *Chin Yow* v. *United States,* 208 US 8.)

Upon a rehearing, the Housing Authority, of course, could not show that it had given the tenant a hearing of its own prior to giving notice of termination, nor could it show that it had stated to the tenant what its reason, if any, was. If these were the relevant issues, a rehearing by the trial Court, as Justice Douglas points out, would serve no purpose. Also, the trial Court and the North Carolina Supreme Court had already passed on the evidence relating to Petitioner's claim of denial of her exercise of First Amendment rights, and on the evidence had found against her. There was competent evidence upon which the trial Court could make this finding of fact; and it, therefore,

should be sustained. Only if the trial Court had refused to make findings of fact on this point because it deemed it irrelevant would a rehearing be required, since that position would have brought this case within the rule followed in *Holt* v. *Richmond Redevelopment and Housing Authority,* 266 F. Supp. 397 (E.D. Va., 1966) and in *Detroit Housing Commission* v. *Lewis,* 226 F. 2d 180 (6th Cir. 1955).

Cases decided throughout the land have recognized and acted upon this theory. In Illinois, for example, it is recognized that a Housing Authority cannot evict a tenant because of an unconstitutional condition placed upon occupancy as was the case in *Chicago Housing Authority* v. *Blackman,* 4 Ill. 2d 319, 122 NE 2d 522 (1954), where the Housing Authority notified the tenant that it was terminating the lease because of the tenant's failure and refusal to subscribe to a loyalty oath. On the other hand, where no unconstitutional condition was found, there was no prohibition against the Housing Authority's evicting a tenant holding a month-to-month tenancy under lease after giving due notice of termination without assigning any reason other than that the lease had terminated under its terms. *Chicago Housing Authority* v. *Ivory,* 341 Ill. App. 282, 93 NE 2d 386 (1950); *Brand* v. *Chicago Housing Authority,* 120 F. 2d 786 (CCA 7, 1941). This rule in Illinois was recently applied by the Illinois Supreme Court in *Chicago Housing Authority* v. *Lindsey Stewart,* (—— Ill. —— (1968)) decided in March, 1968. In that case, Justice Klingbiel, speaking for the Court, said: "It is urged that due process of law precludes an 'arbitrary' termination of tenancies such as this. We cannot accept such a contention. It was a condition of granting to defendant these benefits, at

public expense, that the occupancy be on a month-to-month basis, and such are the terms upon which the defendant took possession. There is nothing arbitrary about requiring a public-housing tenant to vacate at the expiration of his lease, nor does it deny due process of law, or any other constitutional right that reasons for doing so are not specified. (*Housing Authority of the City of Pittsburgh* v. *Turner,* 201 Pa. Super. 62, 191 A. 2d 869.) As the Federal Court of Appeals observed in a similar case: 'Any property right acquired by the plaintiffs was circumscribed by the terms and conditions upon which it was founded. True, as tenants, they acquired the right of possession, but this right was limited by the terms of the lease, by which such right was obtained. By express provision thereof, either party was entitled to cancellation on fifteen days notice to the other. It is our opinion that this provision with reference to the termination of the tenancy is valid and binding upon plaintiffs in the same manner as though the lessor had been a private person rather than a Governmental Agency.' *Brand* v. *Chicago Housing Authority* (7th Cir. 1941) 120 F. 2d 786."

In other jurisdictions the same distinction has prevailed. This is easily seen by contrasting the cases cited by Petitioner in her Brief, Page 20 thereof, with such cases as *Walton* v. *City of Phoenix,* 69 Ariz. 26, 208 P. 2d 309 (1949); *Chicago Housing Authority* v. *Ivory, supra; Brand* v. *Chicago Housing Authority, supra; Housing Authority of the City of Pittsburgh* v. *Turner,* 201 Pa. Super. 62, 191 A. 2d 869 (1963); *Columbus Metropolitan Housing Authority* v. *Simpson,* 85 Ohio App. 73, 85 NE 2d 560 (1949), which are all in accord with the decision of the North Carolina Supreme Court in this case and are, on the facts presented, directly in

point. To like effect are *United States* v. *Blumenthal*, 315 F. 2d 351 (3rd Cir. 1963); *Municipal Housing Authority for City of Yonkers* v. *Walck*, 277 App. Div. 791, 97 NYS 2d 488 (2d Dept. 1950); *Faris* v. *United States*, 192 F. 2d 53 (10th Cir. 1951); and *Williams* v. *Housing Authority of Altanta*, 223 Ga. 407, 155 SE 2d 923 (1967).

The only case cited by the Petitioner directly supporting her position here is *Vinson* v. *Greenburgh Housing Authority*, decided by New York Supreme Court's Appellate Division, Second Department, on March 11, 1968, where two of the five Judges dissented.

The proposal for a rehearing, then, could be based only on the theory that other reasons were relevant and that the burden was upon the Housing Authority to show them.[2] Reasons other than tenant's exercise of the constitutional right would be relevant only if the Court held that the tenant had a constitutional right of occupancy, apart from the lease, that could be ended only by judicially approved reasons.

This, therefore, is clearly not a due process argument, absent such a right. It is indeed pertinent to determine "the precise nature of the interest that has been ad-

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[2] In *Holt*, the Court cites *Housing Authority* v. *Thorpe*, 271 NC 468 (1967), and said: "There, however, the Court found as a matter of fact that whatever may have been plaintiff's reason for terminating the lease, it was neither because the defendant had engaged in efforts to organize the tenants nor because she had been elected President of a tenants' group. It is that factual distinction which makes that decision inapplicable to the case at Bar." It is that factual distinction which makes the cases cited by the Petitioner relating to the imposition of unconstitutional conditions inapplicable ato this case at Bar. See pages 19 and 20 of Petitioner's Brief.

versely affected." (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 US 123; see Petitioner's Brief, p. 37.) "Due process" does not create the "interest"; due process requirements arise only after a legal interest is found to exist. (In *Willner* v. *Committee on Character and Fitness*, 373 US 96, it was admittance to the Bar; in *Goldsmith* v. *U. S. Board of Tax Appeals*, 270 US 117, it was the privilege of practicing before the Board of Tax Appeals—rights which should be available to all qualified persons.)

In declining to renew the Petitioner's lease, the Housing Authority was not acting as a legislative body nor as a judicial body nor as a regulatory board or commission, but, rather, as a proprietor managing the operation of a housing project. (*Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 US 886.) With respect to this proprietary function, the Housing Authority, under the State law, had no greater powers than those of any other landlord; in fact, the Petitioner is contending that it had much less authority than any other landlord. (See *Marsh* v. *Alabama*, 326 US 501.)[3] The scope and nature of the Housing Authority is private in nature and is Government connected only by virtue of the fact that its housing facilities are in part financed by the Federal Government, and this makes its position unlike that of the

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[3] As we have pointed out before, the doctrine prohibiting the imposition of unconstitutional conditions by an agency of the Government, even if applicable to the Housing Authority, does not present an issue in this case. Therefore, *Sherbert* v. *Verner*, 374 US 398; *Torcaso* v. *Watkins*, 367 US 488; *Shelton* v. *Tucker*, 364 US 479; *United Public Workers* v. *Mitchell*, 330 US 75; *Slochower* v. *Board of Higher Education*, 350 US 551; and *Wieman* v. *Updegraff*, 344 US 183, and other cases in this category cited by Petitioner are not applicable.

Board in *Willner* v. *Committee on Character and Fitness, supra,* where it was held that requirements of procedural due process must be met before a State can exclude a person from practicing law.[4]

Although the Housing Authority Law of the State of North Carolina (G. S. 157-1 through 157-48) grants the Housing Authority varied powers in connection with planning, investigating and advising with municipalities in operating its housing project and in its dealings with the Petitioner, it was not acting either as an agent of the State or of the municipality or of the Federal Government. It was acting pursuant to its statutory power to "prepare, carry out and operate housing projects" (G. S. 157-9). *Wells* v. *Housing Authority,* 213 NC 744, 197 SE 693; *Housing Authority* v. *Johnson,* 261 NC 76, 134 SE 2d 121; *Housing Authority* v. *Thorpe,* 271 NC 468, 157 SE 2d 147 (1967).[5]

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[4] In *Morgan* v. *United States,* 304 US 1, there was no constitutional issue decided, but the Court there did refer to the quasi judicial functions of administrative agencies—in that case, the Secretary of Agriculture in fixing maximum rates at Kansas City Stockyard. To like effect are the deportation cases, holding that there must be an effective review of administrative action by regular judicial branch of the Government—*Ng Fung Ho* v. *White,* 259 US 276, holding that persons about to be deported were entitled to a judicial determination of their claims that they are citizens of the United States and *Kwong Hai Chew* v. *Colding,* 344 US 590.

[5] In *United States* v. *Blumenthal,* 315 F. 2d 351 (3rd Cir. 1963), the defendant, a month-to-month lessee of business property owned by the Federal Government in the Virgin Islands, who was dispossessed, argued that the Government acted arbitrarily in failing to specify in the notice to quit the reason for his decision. In deciding against the defendant, the Court said: "The fact that the plaintiff gave no reason for its notice to quit and sought to evict the defendant while renting other similar business properties to other tenants on a similar month-to-month basis is said to amount

If, then, we look to the decisions of the North Carolina Supreme Court for authoritative construction of North Carolina Statutes, as we must (*Erie Railroad Company* v. *Tompkins,* 304 US 64; *Tucker* v. *Texas,* 326 US 517; *Bell* v. *Maryland,* 378 US 226; *Barsky* v. *Board of Regents,* 347 US 442), the State statute does not help the Petitioner's argument here. The landlord is treated as an ordinary landlord with no governmental powers, and the tenant is treated as an ordinary tenant with the usual rights of tenants, with the possible additional right not to be penalized for exercising a constitutional right. (*Lynch* v. *United States,* 292 US 571, 54 S. Ct. 840, 78 L. Ed. 1434)

In view of this, it is not oppressive, not arbitrary, not unjust—and not unconstitutional—in this confrontation between Petitioner and Respondent to apply rules generally applicable to others.

II.

THE LEASE ENTERED INTO BY THE PETITIONER AND THE HOUSING AUTHORITY IS NOT AN UNCONSTITUTIONAL METHOD OF PRESCRIBING AND DEFINING THE TENANT'S RIGHT OF OCCUPANCY.

We come now to consider whether the month-to-month written lease, executed by the plaintiff, violates the Constitution when it provides that: "The management may terminate this lease by giving to the tenant notice in writing of such termination fifteen (15) days prior to the last day of the term." (A. p. 12). At the trial it was stipulated that the Peti-

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to discrimination against the defendant which was so arbitrary as to deny due process of law. But the plaintiff, which is here acting in its proprietary rather than its governmental capacity, has the same absolute right as any other landlord to terminate a month-to-month lease by giving appropriate notice and to recover possession of the demised property without being required to give any reason for its action."

tioner occupied the dwelling unit "pursuant to this lease and under and by virtue of this lease." (A. p. 5). We take it that this means what it says, is palpably true, and excludes any argument that the Petitioner's occupancy was by some right other than the lease. This lease is a valid contract. *Lynch* v. *United States, supra; Walton* v. *City of Phoenix, supra; Chicago Housing Authority* v. *Ivory, supra; Brand* v. *Chicago Housing Authority, supra; Housing Authority of the City of Pittsburgh* v. *Turner, supra; Columbus Metropolitan Housing Authority* v. *Simpson, supra; Chicago Housing Authority* v. *Lindsey Stewart, supra;* and *Municipal Housing Authority for City of Yonkers* v. *Walck, supra.*

The term of the lease—that it was for a term of one month, automatically renewable unless notice of termination was given—was an integral part of the lease. If the lease was invalid, then the Petitioner had no right to occupancy of the premises, not even squatter's rights, since she had not there held adversely to the Housing Authority for the necessary period of time. Her income eligibility to be accepted as a tenant in the project did not give her a right of occupancy, since all those who are so eligible are not and cannot be accepted due to their number as contrasted to the available dwelling units and, also, because there is nothing in the program by State or Federal Statute or Federal Regulation that requires the Housing Authority to construct or operate such dwelling units to house all those who are eligible. The statutory provisions prohibiting the continued occupancy by a tenant if the tenant's income eligibility ceases cannot be construed as meaning the tenant has a right to occupancy so long as that eligibility continues. On the other hand, the statutes creating the program contemplated that occupancy of the dwelling

units be regulated by using the legal devises and concepts normally involved in and arising from the landlord-tenant relationship. The system produced by both the United States Housing Act of 1937, as amended, and the North Carolina "Housing Authority Law" requires that this be done. The State statute said, in several places, that the Housing Authority may "rent or lease the dwelling accommodations" (NC G. S. 157-29; *Housing Authority* v. *Thorpe*, 271 NC 468, 157 S.E. 2d 147 (1967).) Language consistent with these concepts is also contained in the Federal statutes. Neither statute undertook to set out a form for such lease nor prescribed the length of any term nor the method by which the tenancy should be ended.

The Annual Contributions Contract between the Housing Authority and the Federal Agency, in the form which we believe to be generally applicable in the nation, provides that a local authority shall not permit any family to occupy a dwelling unit in any project except pursuant to a written lease, which lease shall contain all relevant provisions necessary to meet the requirements of the Housing Act of 1937, as amended, and the Annual Contributions Contract. The local Housing Authority Management Handbook, published by the Public Housing Administration (now Department of Housing and Urban Development), states that: "Whenever a family is admitted to occupancy in a low-rent project, there is established a landlord-tenant relationship with contractual obligations to be fulfilled by both parties."[6] It further

[6] Part IV, Section 1, Paragraph 6a. The whole sub-paragraph reads as follows: "Whenever a family is admitted to occupancy in a low-rent project there is established a landlord-tenant relationship with contractual obligations to be fulfilled by both parties.

provides (Part IV, Section 1, Paragraph 6d(1)): "It is recommended that each local authority's lease be drawn on a month-to-month basis whenever possible. This should permit any necessary evictions to be accomplished with a minimum of delay and expense upon the giving of a statutory notice to quit without stating reasons for such notice."

The HUD Circular of February 7, 1967 (App. IV, p. 26a, Petitioner's Brief) does not substantially change this position. From a consideration of what that Circular does not say, it is difficult to reach a logical conclusion as to what it does say. It does not, for example, purport to change the terms of the lease provisions used by Housing Authorities, nor does it purport to take away from the Housing Authority its legal ability to evict by complying with the terms of the lease and the pertinent provisions of the State law relating to evictions. It does not deal with what reasons are acceptable to HUD nor does it deal with the reason that the term of the lease had expired as an acceptable reason. It did not purport to change the provisions of the Handbook above quoted. What

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These obligations include many of those in standard landlord-tenant leases, such as the provision by the landlord of designated housing space and utilities and the payment of rent by the tenant. But in low-rent public housing there are also the following special obligations of a tenant to be reflected in the lease: (1) Furnish the Local Authority, upon request, with information necessary to determine eligibility for continued occupancy, the appropriate rent and dwelling size required. (2) Pay an increased rent when appropriate for its redetermined income or family composition. (3) Transfer to a unit of appropriate size (at such time as the Local Authority may designate) when a change in family composition warrants a different size dwelling. (4) Vacate if the family becomes overincome or becomes subject to removal through violation of any obligation of tenancy."

HUD believes to be desirable or essential administrative practice by the Local Authority can be, and apparently is, entirely different from any legal requirements pertaining to a judicial eviction proceeding.

This Circular certainly does not answer the question as to what reasons must be shown, if any, by the Housing Authority in an action in Court or an eviction before the Housing Authority can prevail. It does not require the Housing Authority to produce such reasons in Court and deals only with a public relations matter. Whether the phrase "from this date" used in the Circular was intended to refer both to the activity of informing the tenant and to maintaining the records, it obviously appears in the only paragraph containing directive language.

The Petitioner (and perhaps HUD) seeks to establish this document as a legal instrument, imposing judicially enforceable duties upon local Housing Authorities; but cast in this role, it is fatally defective for vagueness. Even the Petitioner's Brief finds great difficulty in interpretation, saying, in substance only, that it amounts to a directive by HUD to the Courts to apply constitutional "due process" concepts to events occurring before the institution of an eviction proceeding in Court. By expressing a belief that a reason should be stated to the tenant without saying what sort of reason would be required, it does not alter the in-court requirements of proof in eviction proceedings, and does not create an identifiable right enforceable by the tenant. As the Petitioner's Brief points out, "The Circular does not prohibit the use of month-to-month leases under which the Authority may obtain a judgment of eviction on the sole basis of proper notice of

termination and without any allegation or proof of cause." (Petitioner's Brief, p. 60.)[7]

Moreover, the Circular clearly does not say that a Housing Authority cannot terminate at the end of any term without cause as is provided in the lease. Here, the tenant was well aware that the reason for the eviction proceeding was that she was holding over after the end of the term of her lease.

Circulars of this sort do not change the situation. HUD might as well have issued a Circular requiring officials of the Housing Authority to be kind and considerate of tenants when making demand upon the tenants for the payment of rent. In such event, it is doubtful that the tenant could assert, as a justification for his nonpayment of rent, that an official of the Housing Authority was not kind and considerate.

The use of the lease devise, a normal landlord and tenant instrument, is a means of preventing the segregation of the tenants in public housing projects from the society in which they live. The Federal Government, in establishing this program, has not provided institutions in which all indigents may be inmates, but has granted financial assistance to local housing authorities organized under State law for the purpose of injecting into the housing rental market a substantial number of decent low-rent dwelling units.

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[7] It is interesting to note, moreover, that Petitioner's Brief refers to HUD's Housing Authority Management Handbook as being "nonmandatory" and points to the language contained therein—"it is recommended" that leases be drawn on a month-to-month basis—while on the other hand arguing that the Circular of February 7, 1967, is mandatory even though it uses such language as "we believe."

This gives the Housing Authority no governmental authority with respect to its tenants and no authority greater than that possessed by any other landlord. The interpretation and the enforcement of the lease is a matter for the Courts. There is no Federal administrative, statutory, or Constitutional requirement that the term of such lease be for the duration of the lifetime of the tenant or for the duration of his eligibility, there being no guarantee that all members of the eligible class shall have low-rent housing within a housing authority project. As the Court said, in *Brand* v. *Chicago Housing Authority, supra:* "The fact that the government selected plaintiff as the object of such beneficence does not preclude it from determining at a later time that the purpose of the act will be better served by the selection of some other family of the same or lower income class. To hold, as plaintiff would have us do, that the mere selection of a tenant carries with it a continuing right of tenure irrespective of the terms and conditions upon which the tenancy was founded, would not only contravene the purpose and policy of the act, but would come near to destroying it."

III.

THE CIRCULAR, WHATEVER IT MAY BE, DID NOT HAVE APPLICATION TO EVENTS THAT OCCURRED BEFORE THE ISSUANCE DATE OF THE CIRCULAR.

The relationship between the Respondent, Housing Authority, and HUD is contractual. The United States Housing Act of 1937, as amended, (42 USC § 1401, et seq.) recognizes that it was dealing in large measure with local "Public Housing Agencies" which, in this case, was this Respondent, duly organized under

the provisions of the North Carolina "Housing Authority Law." This State statute is its charter, giving it powers and authorities and duties, including the power to "prepare, carry out and operate housing projects" (G. S. 157-9; A. p. 13a, Petitioner's Brief) and to enter into contracts with the Federal Government pursuant to operating housing projects "as the Federal Government may require, including agreements that the Federal Government shall have the right to supervise and approve the construction, maintenance, and operation of such housing project." (G. S. 157-23; A. p. 17a, Petitioner's Brief.)

The United States Housing Act of 1937, as amended, provided for the financial support of such Local Public Housing Agency as the Housing Authority here by entering into an Annual Contributions Contract with such Local Agency. The Statute says: "The Authority shall embody the provisions for such annual contributions in a contract. . . ." (42 USC § 1410(a)). Thus, HUD was to regulate matters, not by edict or decree, but by the terms of an Agreement, some of the provisions of which were established by requirements of the Statute. For example, "Every contract for annual contributions shall provide that whenever, in any year, the receipts of a Public Housing Agency in connection with a low-rent housing project exceed its expenditures (including debt service and charges) an amount equal to such excess shall be applied or set aside for application to purposes which in the determination of the Authority will affect a reduction in the amount of subsequent annual contributions."

(42 USC § 1410(c)). It dealt with what the contract should contain with respect to tenant selection.[8]

While HUD was given authority to make "such rules and regulations as may be necessary to carry out the provisions" of the statute, it could not thereby make a rule or regulation that changed the basic concept of the statute that the relationship between the parties (HUD and the Housing Authority) is by contract. As we have seen, the State statute establishing the Housing Authority required obedience to HUD and its rulings only by contract. The contract itself does not refer to any manuals or circulars issued or to be issued by PHA or by HUD. (See App., p. 1a.)

The Housing Act itself deals in considerable detail with what the contents of the contract between HUD, or the Federal authority, and the Local Housing Authority should be. It states that the contract should provide that excess income of the Local Authority, over and above its necessary operating expenses, should be applied to debt service (42 USC § 1410(c)); that income limits of those eligible be approved by the Federal authority; that admission policies be promulgated by the Local Authority and approved by the Federal authority; that the Local Authority re-examine the in-

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[8] 42 USC § 1410(g) provides in part: "Every contract for annual contributions for any low-rent housing project shall provide that—(1) the maximum income limits fixed by the public housing agency shall be subject to the prior approval of the Administration. . . . (2) the public housing agency shall adopt and promulgate regulations establishing admission policies. . . . (3) the public housing agency shall determine, and so certify to the Administration, that each family in the project was admitted in accordance with duly adopted regulations and approved income limits. . . ."

come of tenants at least annually (42 USC § 1410(g)); that contracts should not be entered into with Local Authorities that did not have certain tax exemptions (42 USC § 1410(h)); and that the Local Authority not be required to make payments for utilities different from private persons and corporations (42 USC § 1410(i)). Nowhere, however, did it contain a requirement that the contract vest in HUD authority to prescribe the terms and conditions of the lease to be used by the Local Authority other than the tenant-income feature, nor did the statute provide that HUD by the contract should be vested with any authority over the procedures of the Local Authority in giving notice of termination of the term of the lease. The Annual Contributions Contract between HUD and the Local Authority contained no such requirements.

Even if this HUD Circular is construed to modify the Annual Contributions Contract between HUD and the Housing Authority and further modify the terms of the lease between the Housing Authority and the Petitioner here, it does not follow that such modification invalidated the notice by which the Petitioner was informed that her lease would not be renewed for another term. These rights are property and contract rights vested in the parties which the Petitioner seeks to have changed *ex post facto* by the HUD directive. As Chief Justice Marshall said, in *United States* v. *Schooner Peggy*, 1 Cranch 103, 110, 2 L. Ed. 49 (1801): "It is true that in mere private cases between individuals, a Court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties. . . ." And, in *Hamm* v. *Rock Hill*, 379 US 306, 313, 85 S. Ct. 384 (1964), the Court, in giving the reason for the retroactive rule applied in

that case, quotes Chief Justice Hughes, saying: "Prosecution for crimes is but an application or enforcement of the law, and, if the prosecution continues, the law must continue to vivify it." This case at bar, of course, is not a prosecution for a crime.

Recognizing that it has been held that the specific prohibition of the Constitution relating to *ex post facto* laws applies to statutes making acts criminal after the fact, nevertheless this Court has recognized, as in *Lynch* v. *United States, supra,* that contractual rights may find protection under the prohibitions of the Fifth Amendment. As Justice Brandeis said for the Court in that case (*Lynch* v. *United States,* 292 US 571, 579): "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment."

Here, rights have been vested by contract between the Petitioner and the Housing Authority, by a contract between the Housing Authority and HUD, and by a Judgment of the Courts of the State of North Carolina.[9]

"It is the policy of the United States to vest in the local public housing agencies the maximum amount of

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[9] We are not, of course, asserting that the Congress could not by statute change remedies available to landlords and tenants, even after Judgment had been entered in the exercise of its general powers to control rents in emergency situations, as was the case in *Fleming* v. *Rhodes,* 331 US 100, for the situation here is far different than the one that existed in that case or in *FHA* v. *The Darlington, Inc.,* 358 US 84.

responsibility in the administration of the low-rent housing program. . . ." (United States Housing Act of 1937, as amended, 42 USC § 1401.) This contemplated implementing legislation on the State level. Accordingly, the "Housing Authority Law" of the State of North Carolina provided that the very creation of a local housing authority given by statute power to enter into contracts with the Federal agencies would be a matter for the consideration and determination by the City Governing Body (G.S. 157-4). As a preliminary to entering into a contract with the Federal agencies, the Housing Authority, once created, must enter into a Cooperation Agreement with the City in which it is located. The State statute has its own provisions governing rentals and tenant selection. (G.S. 157-29.)

It is not unreasonable to say that at least one of the reasons for this policy was to encourage localities to participate in the program and thereby increase the effectiveness of Federal expenditure in connection therewith. The local control feature presumably had a good deal to do with legislative acceptance of the program at all levels. The concept that the occupants of the dwelling units would be treated in the same way as tenants in privately owned properties is not an unreasonable feature of this concept. In view of this policy, HUD has not undertaken by this Circular or otherwise to ban the use of a lease in form and content as was in effect between the Petitioner and the Housing Authority in this case, nor has it undertaken by directive to state that specific reasons for terminating the lease had to be established by the Housing Authority before notice of termination be given.

We respectfully submit, therefore, that it is not unconstitutional for the State Court to construe the HUD

Circular of February 7, 1967, in the manner that it did—that is to say, that the Circular, whatever its prospective effect would be, did not act retroactively to change the contractual relationship between the Petitioner and the Housing Authority as of the time the lease was terminated, nor to render the eviction action in the State Courts void.

CONCLUSION

We respectfully submit that the Judgment of the State Court in this case is not oppressive to the Petitioner, does not deal with the Petitioner in a manner different from other citizens, does not violate any Federal law, and is not prohibited by any provision of the Constitution, and, therefore, should be sustained.

It has not been shown to be necessary or socially sound for this Court to endeavor to fashion special laws for persons of Petitioner's assumed economic status or laws to be effective only when and where housing shortages may exist. There is no evidence about such matters in the record.

Respectfully submitted,

DANIEL K. EDWARDS
WILLIAM Y. MANSON
111 Corcoran Street
Durham, North Carolina
Attorneys for Housing Authority of the City of Durham.

APPENDIX